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DIVISIONAL COURT. DECEMBER 21ST, 1912.

RUFF v. McFEE.

Landlord and Tenant—Lease—Action to Set Aside—Fraud and Misrepresentation—Collateral Agreement — Alleged Breach of—Tenant in Possession—Counterclaim—Costs.

Appeal by the defendant from the judgment of the Judge of the County Court of the County of Lambton, in an action to set aside a lease, and for damages for breach of agreement, fraud, and misrepresentation.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

R. I. Towers, for the defendant.

F. McCarthy, for the plaintiff.

BRITTON, J.:—The plaintiff, in my opinion, is not entitled to recover in this action. So far as the facts are set out in the statement of claim, these were as well known to the plaintiff as to the defendant, and there is nothing that would give the plaintiff the right of action by reason of fraud. The plaintiff entered into possession of the premises and made such alterations in them as he thought would suit his purpose; he is not now in a position to give up these premises in the same condition as when the plaintiff received them, or in a condition, without the expenditure of money, to be available for the defendant; the plaintiff, therefore, is not entitled to a rescission of the lease. As to the alleged permit from the town, no doubt both parties acted in good faith, but the plaintiff knew as much about the by-law and terms under which a permit would be granted, as did the defendant, or, if the plaintiff did not know, he ought to have known, as he had equal means of knowing as the defendant. The defendant did nothing to prejudice the plaintiff. The plain-

tiff's other alleged cause of action is upon a collateral agreement. Apart from the legal difficulty in the plaintiff's way, the agreement sought to be set up was too vague and indefinite to found an action upon. The appeal should be allowed. In the unfortunate situation which has arisen, the best disposition which can be made of the case, is to strike out the counterclaim without costs, and without prejudice to any action the defendant may take to enforce such counterclaim, or any claim he may have against the plaintiff by reason of the lease, and to allow the appeal without costs and dismiss the action without costs.

RIDDELL, J., agreed in this disposition of the case, giving written reasons, in which he referred to the following authorities: Cowan v. Milbourn, L.R. 2 Ex. 230; Leake on Contracts, 5th ed., pp. 550, 551; Adam v. Newbigging (1888), 13 App. Cas. 308.

FALCONBRIDGE, C.J.K.B., agreed in the result.

DIVISIONAL COURT. DECEMBER 21ST, 1912.

CONNOR v. PRINCESS THEATRE.

Trespass—Savage Monkey—Kept in Yard Adjoining Theatre where Performance Given—Liability of Proprietors of Theatre—Yard no Part of Theatre Premises.

Appeal by the plaintiff from the judgment of the Senior Judge of the County of Wentworth, of October 23rd, 1912, in an action for damages resulting from the bite of a monkey, which, it is alleged was brought upon the premises of the defendants used in connection with their theatre.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

A. M. Lewis, for the plaintiff.

H. McKenna, for the defendants.

LATCHFORD, J.:—If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, I am answerable in trespass: Lord Ellenborough, C.J., in Leame v. Bray (1803), 3 East 593, 595.

It is not essential to liability that the defendant should

own the animal. If a person harbours a dangerous animal, or allows it to be at, and resort to his premises, that is sufficient: McKone v. Wood (1831), 5 C. & P. 1. In May v. Burdett (1846), 9 Q.B. 101, an action brought by the husband of a woman who had been bitten by a monkey, Lord Denman declares that the liability is put upon the true ground by Lord Hale in 1 Pleas of the Crown, 350: "Though the owner have no particular notice of the quality of his beast, that he did any such thing before, yet if it be a beast feræ naturæ, as a lion, a bear, a wolf, yea an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in Andrew Baker's case, whose child was bit by a monkey that broke its chain and got loose."

May v. Burdett was approved recently in the remarkable case of Baker v. Snell, [1908] 2 K.B. at p. 355, which was sustained on appeal: ib. 825.

Here, however, it is sought to attach liability, not to the owner or keeper of the mischievous animal, but to the managers of the theatre where the owner was engaged for a few days. The premises on which the monkey was when it bit the plaintiff's child were not the premises of the defendants, nor under their control. The utmost length to which the evidence on the point goes is that the defendants knew certain performers used the yard occasionally to store their paraphernalia, and also knew that the owner of the monkey had tied the animal on the day prior to the accident to a table in the yard. No right so to use the yard was in the defendants or the performers. The animal was upon the premises of the restaurant keeper. It was not kept or harboured by the defendants, and no liability attached to them.

The appeal fails and must be dismissed. It is not, I think, a case for costs.

Boyd, C., came to the same conclusion, giving reasons in writing.

Middleton, J., agreed with the judgment of Boyd, C.

LATCHFORD, J. DECEMBER 21ST, 1912.

RE STANTON.

Will — Codicils — Construction — Absolute Gift — Restrictions as to Mode of Enjoyment—"Reliance on Sense of Justice and Kindliness of Heart"—Precatory Trust—Dower—Election.

Motion by executors for an order under Con. Rule 938 construing the will and three codicils of the late Edmund Patrick Stanton.

E. P. Gleeson, for the executors.
M. J. Gorman, K.C., for the widow.
D. O'Brien, for other legatees.

LATCHFORD, J.:—The opinion of the Court is sought on the following points: "1. As to whether the interest granted the widow under the original will of the deceased is restricted to a life interest by the codicils to said will.

"2. As to whether the widow is entitled, after payment of the debts and legacy of $140 referred to in the codicil dated June 4th, 1903, to have an absolute transfer to her from the executors, of the corpus of the estate.

"3. In the event of it being decided that said entire corpus is not to be transferred to the said widow, what part of the said corpus, if any, are the executors and trustees authorised to transfer?"

Mr. Stanton died May 24th, 1912, and probate of his will and three codicils was granted October 17th, 1912.

By his will, dated May 12th, 1897, the deceased devised and bequeathed all the real and personal estate to which he should be entitled at the time of his decease to his wife Sabina, whom he appointed his sole executrix.

The first codicil—June 8th, 1901—modified the will only to the extent of substituting as executor, in the place of his wife, the Trusts & Guarantee Company; and the second—June 4th, 1902—merely bequeathed a legacy of $140 to a sister of the testator.

By the third codicil, dated November 16th, 1911, the testator ratified his will, save in so far as any part of the will is inconsistent with the last codicil or with either of the two preceding codicils.

The codicil proceeds:

Whereas by my said will I have made my wife sole devisee and legatee thereunder, I now desire that this provision be also subject to the condition and proviso that upon her death sixty per centum of my property or estate remaining at the time of her death be divided, share and share alike, as follows:"

Then come the names of a brother and two sisters, and a provision that in the event of the death of any such legatees the legacies are to inure to their heirs.

The codicil proceeds:

"The balance or forty per centum of my remaining property or estate to be disposed of as my dear wife may please (this devise or bequest to be in lieu of her dower, should the latter not have been satisfied previously in the provisions of my will itself). Be it remembered, however, that it is not my intention by the present codicil to restrict in any way my dear wife's reasonable enjoyment of the provision made for her in my last will and testament which, of course, is subject to the three codicils now existing thereto, but only to secure that upon her death any real or personal estate remaining and traceable to said provision to her may be disposed of as directed in the present codicil. In the carrying out of this wish I rely wholly on the sense of justice, as well as on the kindliness of heart, of my beloved wife."

The estate is sworn at a little over $25,000; all realty, except about $300. The debts are about $1,000. To pay them it will be necessary to sell the real property.

It was stated upon the argument that Mrs. Stanton would elect to take the benefits under the will in lieu of her dower.

From the language of the codicil and the intention of the testator thereby manifested, I think that he clearly limits the absolute gift to his wife conferred by the will itself.

That devise is to be "subject to the condition and proviso" that upon her death sixty per cent. of the property of the deceased then remaining and traceable to the devise in her favour shall pass to the testator's brother and sisters. In impressive words he reiterates his intention that his wife's reasonable enjoyment of the provision made for her in the will—that is, the devise to her of all absolutely, less the $140 to a sister—is not to be restricted by the last codicil except to the extent that a fixed proportion of what, if any, of his estate may be in her hands at her death shall pass to his relatives, and not be in her power to dispose of. During her life all is hers. Upon her death, forty per cent. of the testator's property remaining "at the time of her death" may be disposed of as Mrs. Stanton may

direct; or, failing any testamentary disposition, will pass to her personal representatives.

That the estate shall be reasonably used and enjoyed, so that a substantial part may pass to his relatives, is manifested by the testator's words expressing that for the carrying out of his wishes he relies wholly on his wife's sense of justice and her kindliness of heart. The words, however, fall far short of imposing an obligation, and create no precatory trust.

After the executors shall have paid the debts of the deceased and the legacy of $140, and, if it should be necessary for such purpose, shall have sold the realty, Mrs. Stanton is entitled to the whole estate, provided she shall previously have elected to take under the will as against her right to dower. The property of her husband is hers to use as she may deem proper; but of any that may remain at her death, not consumed by use, three-fifths is not to be at her disposal, but will pass as directed by the codicil.

As has been often said, cases are of little use where the intention of the testator may be gathered from the will itself. The following, however, cited upon the argument, are to some extent in point: Re Tuck, 10 O.L.R. 309; Re Davey, 2 O.W.N. 467.

I would also refer to Re Rowland, 86 L.T.R. 78; Re Willatts, [1905] 1 Ch. 378, as reversed, [1905] 2 Ch. 135; and especially FitzGibbon v. McNeill, [1908] 1 I.R. 1.

Costs of all parties out of the estate.

MIDDLETON, J. DECEMBER 21ST, 1912.

RE STEWART, HOWE & MEEK.

Company—Contributory — Subscription to Stock — Promissory Note—Alleged Misfeasance—Allotment—Rescission.

Appeal by the liquidator from the decision of Mr. Cameron, Official Referee, dismissing the application of the liquidator to place Charles S. Meek upon the list of contributories, and to make the said Charles S. Meek liable in respect of certain misfeasance and breach of trust in relation to the company.

W. N. Tilley, for the liquidator.
H. E. Rose, K.C., for Charles S. Meek.

MIDDLETON, J.:— . . . Three distinct questions arise. First, it is said that Meek is liable in respect of seventy-five shares, parcel of the original subscription; secondly, that he is liable in respect of a further subscription of one hundred shares; thirdly, that he is liable in respect of certain moneys charged to him in the books of the company, of which he was at the time general manager.

Dealing with these in order—Meek subscribed for the 75 shares. He gave his promissory note for this amount, payable to the company. The company transferred the note to another company, known as the Stewart, Howe & May Company, and this company claims to be the holder of it.

I think the note is payment for the stock, and that the referee was right in refusing to place Meek on the list of contributories in respect thereof.

The agreement entered into at the time of the organization of the company appears to be intelligible, and there is some ground for supposing that the facts connected with the organization of the company and the transfer of the note have not been adequately investigated. It may be that the officers of the company are liable for misfeasance in parting with this note, and it may be that the transfer of the note can be attacked. The liquidator has not attempted to assert liability on the part of Meek for misfeasance, except in respect of the one matter hereinafter mentioned; and the order should be modified so as to make it clear that the claim made against Meek for misfeasance, and which was dismissed by the referee, is the only claim for misfeasance as yet adjudicated upon, and that the dismissal is without prejudice to any other claim open to the liquidator to make.

The second claim referred to arises out of a totally different set of circumstances. The company was originally incorporated with a capital of one hundred thousand dollars. An increase of the capital to $150,000 was afterwards desired. The amount of stock subscribed was less than ninety per cent. of the original capital. By the Companies Act, 7 Edw. VII. ch. 34, sec. 13, subsec. (a), it is provided "that the capital of a company shall not be increased until ninety per centum thereof has been subscribed and ten per centum paid thereon."

The stock that had already been subscribed in this company, —except the 75 shares subscribed by Meek—had been paid for by the transfer of business assets from the Stewart, Howe & May Co., to the Stewart, Howe & Meek Co., and Meek had paid for his 75 shares by his note, which had been transferred

to the Stewart, Howe & May Co.; so that not a dollar of cash had been put into the venture.

For the purpose of obtaining the supplementary letters patent, Meek subscribed for one hundred shares of stock. On the 9th of December, a meeting of the shareholders of the company was held, at which all the shareholders were present or represented. At this meeting the hundred shares were allotted to Meek, and it was directed that a stock certificate should issue to him. See minutes of the meeting of that date, attested by Meek himself as President. This allotment is also recognised by the directors—See minutes of directors' meeting of the same day.

Upon the strength of this subscription, the application was made and the supplementary letters patent were issued; the necessary affidavit proving the subscription for more than ninety per cent. of the stock being made and lodged with the Department.

Thereafter—on the 23rd of January, 1909, Meek transferred a patent for a skirt supporter and waist holder to the company, in consideration of the allotment to him of 260 shares of the stock of the company as paid-up stock.

It does not appear from the minutes that this 260 shares includes the 100 shares for which Meek had subscribed.

In September, 1909, the company determined to increase its capital stock from $150,000 to $200,000. It was again necessary that ninety per cent. of the capital should have been subscribed; that is, 90 per cent. of $150,000. Meek treated himself, and his associates treated him, as a stockholder in respect of both sums, and application was made for the supplementary letters patent upon that basis. The papers deposited shewed that Meek was a stockholder in respect of this hundred shares upon which nothing had been paid.

In making the annual returns to the Government, as required by the statute, for the year 1908, Meek is shewn as a stockholder in respect of 891 shares, on which $10,000 is unpaid; and in the return made in February, 1910, he is shewn as a stockholder for 926 shares, on which $10,000 is unpaid. This proves conclusively that the $10,000 stock was not supposed to be part of the 260 shares allotted for the patent.

Meek himself verifies these returns, not merely by his signature, but by his oath; and his explanation that the amount was carried forward by a mere oversight cannot be accepted, as the returns were apparently prepared in typewriting, but a correction is made in ink, shewing the $10,000 as still due.

The learned referee has exonerated Meek in respect of this sum, because he says there was no stock which could be issued. At the time the stock was allotted and the resolution was passed directing its issue, there was stock. What took place subsequently is what the referee relies upon. I do not think it has any bearing upon the case. On the same day as the resolution allotting 260 shares—23rd January, 1909—more than six weeks after the 100 shares had been allotted on the 9th November, 1908—by-laws were passed for the purpose of converting some of the common stock into preference stock. Four hundred and forty shares were directed to be sold, allotted, and issued as preference shares.

If Meek was already the holder of the hundred shares and also the holder of the 260 shares, there were not 440 shares capable of being so converted.

The referee seems to regard this as in some way rescinding the previous allottment of a hundred shares. I cannot follow this reasoning. The 440 shares never were in fact allotted: the whole scheme of flotation of these preference shares seems to have been abortive; and it was after this date that the solemn application was made for the increase of stock, in which Meek was shewn as the holder of the shares in question, yet unpaid. I think that the referee ought to have placed him upon the list of contributories in respect of this subscription.

There then remains the third matter. In the last agonies of the company it was proposed to transfer the assets to a new organisation. For the purpose of adjusting the books in connection with this transfer, certain amounts appearing to be due by two concerns were as a matter of bookkeeping charged to Meek. It is impossible to understand what was in the mind of the instigator of this transfer; but the bookkeeping entry does not, I think, amount to misfeasance. The company was in no way worse off if the transaction were made; and I cannot see anything by reason of which it can be said that this amounted to misfeasance which would make Meek liable.

The report in review will therefore be amended by holding Meek liable in respect of the ten thousand dollars, and will be affirmed in respect of the other two matters, and will be modified as above indicated so as to leave the liquidator free to prosecute any other charge of misfeasance.

As success is divided, I do not give costs.

DIVISIONAL COURT. DECEMBER 23RD, 1912.

RE JOHNSON.

Will—Construction—Bequest of Personalty—Absolute Bequest or Bequest of Life Interest—Implied Contingent Power to Encroach upon Capital for Maintenance.

Appeal by Agnes Johnson from the judgment of MULOCK, C.J.Ex.D., noted ante 153.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

N. B. Tudhope, for the appellant.

D. Inglis Grant, for Janet Ratcliffe, a beneficiary, and an executor.

BOYD, C.:—The testator made his will in June, 1909, and died in August, 1911, his financial condition between these two years being much the same.

He left a widow and grown up children—married and doing for themselves. His wife was at the date of the will weak and with failing eyesight—she is now old, infirm, and stone-blind. After paying debts his estate consists of land with house and its belongings, and personal property. The latter is chiefly made up of mortgages aggregating $4,400, notes amounting to $1,125, and money equal to $1,550, in all about $7,000 yielding (say) $350 a year.

The frame of his will is to give the whole of his property, real and personal, to his wife for life or widowhood (this last alteration may be dismissed). After her death the house and furniture or any live stock or chattels to one of the daughters, and after the wife's death legacies are to be paid to various sons, amounting in the whole to $3,200, and this clause contains the crucial words—at her death, then, "the legacies shall be paid forthwith if there is sufficient to pay the same; if not, then a corresponding deduction shall be made in every case."

All the residue of the estate is given among the daughters.

Upon the construction of the will the Chief Justice has held that the widow has a life estate only and not an out-and-out ownership. I agree that this is a right result, but would carry the benefit intended for the widow a little further, and say that she has a life estate and interest in all the property, with an implied contingent power to encroach on the capital for the purposes of maintenance. This aspect of the case was not presented

to or considered by the Chief Justice, but it is a fair and reasonable conclusion to be drawn from the language of the will construed in the light of the surrounding facts known to the testator when he made his will, and at the time of his death.

He knew that his wife would need support and maintenance, and he left her all his property for her life for that purpose. He also knew that the income of the estate, while enough perhaps for a woman able to fend for herself, would be insufficient for one blind and infirm, and he knew that after paying debts he would leave plenty of easily available property, which he refers to as "funds," to pay the $3,200 legacies in full, if that available property were not diminished by being drawn upon. Under the terms of this will the widow is entitled to enjoy the whole property in specie and the money in her hands and coming into her hands from the notes and mortgages so much as she might need to apply for the satisfaction of her own proper wants. Such it appears to me is the only satisfactory explanation to be given of the language used by the testator. The income of $350 is not enough, rather would about $600 be required per year to have this blind woman properly looked after and supported. To this extent, a measurable extent, is the widow permitted to exercise power to encroach upon the moneys of the estate.

The case laid is in a somewhat confused condition upon this branch, yet many decisions support this conclusion.

The most recent case cited, Re Dixon, is not of authority because only found in the Weekly Notes, Vol. 56 p. 445 (February, 1912) by Mr. Justice Neville. The will was of all the man's estate to his wife during widowhood, and at her death or remarriage the residue to be divided between children. The Judge held that "residue" had the same meaning as "remainder" used and construed in a will before Mr. Justice Kay, Re Holden, and followed him in declaring that the widow had a life estate only. This throws us back to consider Re Holden (1888), 57 L.J. Ch. p. 648, which cannot be regarded as a satisfactory decision. The will gave the personal estate to the widow for her own use as long as she might live, and on her death directed the remainder of the personal estate which might then exist should be made money, and given to brothers and sisters. It was argued that the words "remainder which might then exist" implied some power of disposition during her life. Kay, J., said:—Did the testator mean to give his wife more than a life estate? I confess that I strongly suspect that he did. The words (as to remainder) look as if he were contemplating a

diminution of capital: but I cannot act upon mere suspicion. The words are intelligible if you refer them to the first direction in the will to pay debts. His wife was an executrix, and it might be that she would have to go on paying debts during her life, and I think the word "remainder" is sufficiently explained by that direction to pay debts.

There is no such outlet in the case in hand, for the wife was not appointed an executrix and the debts were too small to affect the sufficiency of the funds for paying legacies. And besides such a method of construction was not favoured in Re Willets, [1905] 1 Ch. 378; [1905] 2 Ch. 136.

There the testator had appointed his wife executor with power to sell all his property and land, and at her death what is left to be divided between his daughters. Farwell, J., held that the words "what is left" meant the net residue of the estate after payment of debts and costs of realization, and did not give the wife a life or any other interest in the estate. This was reversed by the Court of Appeal, who held that the reference was not to what remained after payment of debts, but what should be left after the exercise by the plaintiff for her own benefit of her power of sale.

On the other hand there is a case decided in 1902, Re Rowland, 86 L.T. 78, by Eady, J., when the bequest of residue was for the sole use and benefit of the wife during widowhood. Should she marry, then the balance, if any, of the money and farm stock not to exceed £400 to be divided between others. She married, and, *held,* that she took absolutely all except as to £400 which went over in the event of there being a balance of any unexpended residue to that amount on the day of re-marriage. It was argued there that "balance" meant what was left after providing for debts, but it was held that "balance" meant the part unexpended by the widow.

This decision appears to go farther than is supportable, but it is upheld by the last editor of Jarman, as decided on the principle that property may be given for life with a power to expend capital, followed by a valid gift over of the unexpended part, p. 464 (note 3) 6th ed., 1910. At one time that was thought to be so indefinite and vague as to be nugatory and ineffective, and so was rejected by the Court.

I think the correct rule applicable to the case in hand is to be found in the words of James, L.J., in Re Thompson's Trusts (1880), 14 Ch.D. 269. He says "the widow took nothing but an estate for life with full power of enjoying the property in specie, so that if there was ready money it need not be invested,

but she might spend it and she might use the furniture and enjoy the leaseholds in specie."

The same reason in this case extends to the use of the notes and mortgages—not absolute and unlimited, but having regard to the need of the widow. The testator does not contemplate the disposition of all the funds available for legacies, but some diminution of it, which is in reason and good sense to be measured and controlled by the executor. The testator speaks of "funds" in the popular sense of assets presently available for the payment of legacies and in this instance to be drawn first from the money in hand, then from the notes as they fall due; and then from the mortgages which run for some years. These funds may be drawn upon for the necessities of the widow as already indicated.

A Nova Scotia case deserves mention, Re McDonald (1903), 35 N.S.R. 500. Testator gave his wife all the estate for her own use during her lifetime. At the death of the wife he gave the house and contents to another for life, and to his nephews thereafter, as well as any money or securities which may remain "after the death of wife."

It was decided by Townsend, J., and affirmed by Justices Ritchie, Graham, and Meagher, that the wife was entitled to more than the income and had a right to use a part, if not the whole of the principal. And the question submitted was approved of, viz., that if the income was insufficient for the maintenance and support of the widow, the executors would be justified in allowing her as much out of the principal or the personal property as may be necessary therefor.

That case appears to be singularly like this, and though not an authority in this Province is a valuable exposition of the law: See also Re Tuck, 10 O.L.R. 309.

With this variation of the judgment the matter will be left in the hands of the executors to deal with as now indicated. Costs of appeal out of estate.

Latchford and Middleton, JJ., concurred.

DIVISIONAL COURT. DECEMBER 24TH, 1912.

TOWNSEND v. NORTHERN CROWN BANK.

Banks and Banking—Securities Taken by Bank under sec. 90 of Bank Act—Securities upon Sawn Lumber—Wholesale Purchaser—"Products of the Forest"—"And the Products Thereof"—Bank Act, sec. 88(1)—Assignment for Benefit of Creditors—Continuation of Former Securities—"Negotiation" of Note—Assignment of Building Contracts—Assignment of Book-debts.

Appeal by the plaintiff and cross-appeal by the defendants from the judgment of MEREDITH, C.J.C.P., reported 26 O.L.R. 291.

The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ.

W. Laidlaw, K.C., for the plaintiff.

F. Arnoldi, K.C., for the defendants.

MULOCK, C.J.:— . . . The plaintiff's grounds of appeal in substance are as follows:—

1. That the debtor, Brethour, was not a wholesale purchaser within the meaning of sec. 88, sub-sec. 1 of the Bank Act;

2. That the lumber in question was not "products of the forest;" and,

3. That the note in respect of which the bank claims to be entitled to the securities claimed, was not negotiated by the bank.

Subsec. 1 of sec. 88, is as follows: "The bank may lend money to any wholesale purchaser or shipper of, or dealer in, products of agriculture, the forest, the quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of, or dealer in, live stock, or dead stock, and the products thereof, upon the security of such products, or of such live stock or dead stock and the products thereof."

Dealing with the first question, the evidence shews that Brethour bought lumber in car-load quantities, storing it in his yard, where he would have at times from two to three thousand feet. The lumber thus purchased was partly used by Brethour in filling building and other contracts, and carrying on his own business generally, and partly disposed of by sales in small quantities to the general public. This business was carried on

in a small village in an agricultural district and the transactions were comparatively small; but, still, Brethour's purchases were in their nature wholesale, and I am of opinion that as a matter of fact he was a "wholesale purchaser."

The second objection, that lumber is not the "product of the forest," within the meaning of the subsection, was dealt with in Molsons Bank v. Beaudry, Q.R. 11 K.B. 212, where the Court, Hall, J., dissenting, affirmed the judgment of Curran, J., who held that lumber was not a "product of the forest." It was argued before us that, at most, the log only was a "product of the forest," and that when the log was sawn into lumber, the lumber became the product of the mill and not of the forest. The section I think is not open to so narrow a construction.

In enumerating the classes of goods, etc., upon which the bank may lend, the section used the words "agriculture," "forest," "quarry," "mine," "sea, lakes and rivers," etc., as indicating the original source of such goods, etc., not the means whereby they are produced, and the lumber produced from the sawing of the log has not thereby, in my opinion, ceased to be a product of the forest. It is not necessary here to lay down any general definition of the word "products" as used in the subsection, it being sufficient for the purposes of this appeal to deal with what is the issue in question.

Beginning then with the standing timber, does it, when felled and sawn into lumber, remain a product of the forest within the meaning of the subsection?

It is common knowledge that manufacturers of lumber, as a rule, own the limits whence they derive their logs, and that their usual method of carrying on the lumber industry is to cause the standing timber to be felled, cut into logs and sawn lumber, sometimes in mills on the limits and sometimes elsewhere, the lumber thus produced being the outcome of the lumber industry as ordinarily carried on, and being in substance the first result of the application of labour to the standing timber or to windfalls. If the application of labour to the timber when in a state of nature robs it of the character of "products of the forest," then the Act contemplates the bank lending only on timber in a state of nature. Like reasoning as to the "products of the sea, lakes and rivers" would limit lending on fish, either to those enjoying their liberty or dead ones in the water, a security in either case hardly contemplated by Parliament. So as to the "products of agriculture." The farmer sows, cuts, gathers, and threshes his grain, sometimes with his own power, sometimes with hired power. Is the standing grain a product,

and thrashed grain not a product, of agriculture? The question, I think, answers itself.

In using the word "products" Parliament did not, I think, intend to limit its use to things in a state of nature, but to include those to which some labour had been applied. To what extent is not necessary here to determine, but certainly, I think, to the extent of enabling the particular industry of lumbering to produce lumber, and the farmer to produce grain. I therefore think the second ground of appeal fails.

As to the third objection. The plaintiff's contention is that the goods claimed by the bank were pledged in respect of prior notes made by Brethour which had been surrendered to him in exchange for renewal notes, and that such renewal notes were not "negotiated" within the meaning of the Bank Act. Brethour's indebtedness grew out of a credit of $7,000 given by the bank to him, and which he agreed to collaterally secure on certain goods under the provisions of section 88 of the Bank Act. The bank from time to time discounted Brethour's notes, taking with each note a pledge of the goods. When a note became due and was renewed, the goods were again pledged in respect of the renewal note, and the old note was surrendered. The giving of such security was in accordance with the understanding of the parties when the original credit was given, and the inference is that the bank would not have surrendered a secured note when due unless the security was continued in respect of the renewal; and that such was the view of both parties is evidenced by the fact that each renewal note was similarly secured.

On the surrender by the bank of an over-due note and the security held therefor, on the understanding that it was to receive in exchange therefor a renewal note similarly secured, such exchange was a valuable consideration, and constituted, in my opinion, a negotiation of the renewal note and supported the security in respect thereof: Bank of Hamilton v. Noye Mfg. Co., 9 O.R. 631. I therefore am unable to give effect to the third ground of appeal and think the plaintiff's appeal should be dismissed.

The defendant bank by cross-appeal claims to be entitled to so much of the book debts assigned to the bank as represents sales of lumber pledged to the bank, and to all the moneys payable under the Johnson and Saunders' contracts. It appears from the examination of the notes of the trial that the cross-examination of Brethour concluded with a reference to the "contracts of Saunders and Johnson," whereupon the plaintiff's

counsel began his re-examination thus: "Take, for example, the larger contract, the Johnson contract was the larger?" And after a few questions regarding the method of working it out, counsel for the bank intervened, saying: "It might facilitate matters if I say the bank does not claim anything that does not represent materials taken from the yard." That statement, having regard to the context, applies, I think, to both the Johnson and the Saunders' contracts, and the learned trial Judge has declared the bank entitled to payment out of those contracts in respect of the pledged materials, thus giving the bank all it claimed at the trial in respect of the Johnson and Saunders' contracts. It cannot now recede from that position and claim all the moneys payable under those contracts. I therefore think that that portion of the cross-appeal should be dismissed.

As to the cross-appeal in respect of the book debts, the learned trial Judge was apparently of opinion that at the trial the bank had abandoned any claim to the book debts, but the notes of the trial do not support this view. To the extent that these book debts represent materials pledged to the bank, the latter, as against the plaintiff, a mere volunteer, is, I think, entitled to follow the proceeds, and to that extent the cross-appeal is allowed. If the parties cannot agree as to the amount, there will be a reference to the Master, who will dispose of the costs of the reference.

No costs of the appeal or cross-appeal to either party.

CLUTE, J.:—I agree.

RIDDELL, J., concurred in dismissing the appeal, giving reasons in writing, but thought the dismissal should be with costs.

DIVISIONAL COURT. DECEMBER 24TH, 1912.

VOLCANIC GAS & OIL CO. v. CHAPLIN.

Water and Watercourses—Crown Grant of Land Bounded by Highway Running near Bank of Lake—Encroachment of Water upon Highway and Land beyond—Right of Grantee to Land Covered by Water — Trespass — Injunction — Damages.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., reported 27 O.L.R. 34, where the facts are set forth.

The appeal was heard by CLUTE, RIDDELL, and KELLY, JJ.
O. L. Lewis, K.C., and W. Stanworth, for the defendants.
G. F. Shepley, K.C., and J. G. Kerr, K.C., for the plaintiffs.

KELLY, J.:—There is, to my mind, a distinction to be drawn between those cases where lands border upon navigable waters, the boundary not being otherwise defined, and the present case, where the boundary nearest to the water is "clearly and rigidly fixed" by the Crown grant, the description in which is by metes and bounds.

In the present case, too, there is the further fact that the land so patented was separated from the water, not only by the Talbot Road, but also by other lands between that road and the water's edge.

The grantee could not have been said to be a riparian proprietor, and his rights and liabilities differed in that respect from those of an owner whose lands border on navigable waters.

After a careful perusal of the evidence and numerous authorities, I am of opinion that the judgment of the learned Chief Justice of the King's Bench is correct and it should not be disturbed.

CLUTE, J., and RIDDELL, J., concurred in dismissing the appeal with costs, giving written reasons, in which the facts and law in the case are discussed with great fulness.

DIVISIONAL COURT. DECEMBER 24TH, 1912.

ERRIKKILA v. McGOVERN.

Assessment and Taxes—Tax Sale—Action to Set Aside—10 Edw. VII. ch. 124, sec. 4—Irregular Sale—Saved by Legislation—Assessment Act of 1904, sec. 173—Computation of Time—Costs.

Appeal by the defendant from the judgment of LENNOX, J., noted ante 195, where the facts are stated.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.
J. Bicknell, K.C., for the defendant.
Glyn Osler, for the plaintiff.

BRITTON, J.:—I am of opinion that the appeal must be allowed, upon the sole ground that the sale of the land was validated and confirmed by 10 Edw. VII. ch. 124, sec. 4.

That Act recites that the corporation represented that all tax sales and deeds held and given prior to the passing of that Act should be confirmed. The request was for an Act validating tax sales held, and deeds for lands so sold for taxes.

Section 4: "All sales of land in the city of Port Arthur, made prior to the 31st December, 1908, and which purport to be made by the corporation of the said city for arrears of taxes in respect to lands so sold, are hereby validated and confirmed, and all deeds of lands, so sold, executed by the mayor and treasurer of the said city, purporting to convey the said lands so sold, to the purchaser thereof, or his assigns, are hereby validated and confirmed. . . ."

The tax sale at which the land in question was sold was held on the 15th November, 1908, and the sale purported to be made for taxes on said land for the years 1905, 1906, and 1907, and a deed purporting to convey said land to the defendant was executed by the mayor and treasurer of said city on the 19th January, 1910.

In this case, and solely by reason of the statute, the defendant is protected.

The appeal should be allowed with costs and the action dismissed without costs.

RIDDELL, J., concurred in this disposition of the case, giving reasons in writing.

FALCONBRIDGE, C.J.K.B., concurred in the judgment of Riddell, J.

MIDDLETON, J. DECEMBER 24TH, 1912.

RE WISHART.

Will—Legacies—Direction to Pay in Future—Postponement of Payment for Convenience—Vesting—Lapse.

Petition by executors for advice under Con. Rule 938.

R. L. McKinnon, for executors, and appointed to represent those opposed in interest to the infants.

F. W. Harcourt, K.C., for the infants.

MIDDLETON, J.:—At the time of the death of the testatrix in March, 1904, she owned a certain parcel of land charged with an annuity in favour of her brother John. She directed her executors to sell this land as soon after her death as convenient, should she survive John: if she predeceased her said brother, then as soon after his death as convenient. The executors were out of the proceeds of the sale to pay certain legacies, inter alia, $200 to Dick Lister, $100 to William Bowley.

The brother died on the 7th December, 1911. Lister survived the testatrix, and died on the 31st May, 1904. Bowley also survived her, and died on the 1st September, 1909. The question is, do these legacies lapse?

Jarman, 6th ed., 1904, thus states the law: "But even though there be no other gift than in the direction to pay or distribute in futuro, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, vesting will not be deferred until the period in question."

This rule has on numerous occasions received judicial sanction. It is, however, contended that the case is governed by Bolton v. Bailey, 26 Grant 361. The will, though similar to the will in question here, is different: as there the wording is "After the sale of my said real estate I give" etc.

I do not think that the learned Vice-Chancellor intended to lay down any new exception to the well-established rules relating to the vesting of legacies. I think that, properly looked at, the case depended upon the particular words used, and that in his view there was no gift until after the sale had taken place.

Here the postponement of payment was clearly for the convenience of the fund; and, to quote again from Jarman (p. 1405) the words used "do not postpone the vesting of the gift to the posterior legatee until the death of 'A,' but merely shew that that is the period at which it will take effect in possession." This statement is based on Benyon v. Maddison, 2 Bro. C.C. 75—a decision of Lord Kenyon's—where the testator gave all the income to his mother for life, and after her decease "I then give to 'A'" etc. The Master of the Rolls there thought that to multiply decisions of the kind suggested "seems reproachful to the law."

The amount of the legacies may be paid into Court, and the executors may be discharged. As the amounts are so small, upon an affidavit being filed that the legatees left no creditors the money may be distributed among those now beneficially entitled.

Costs will be out of the estate.

DIVISIONAL COURT.

DECEMBER 26TH, 1912.

RE SEGUIN AND VILLAGE OF HAWKESBURY.

Highway—Municipal By-law Closing Street—Motion to Quash—No Provision for Compensation—Municipal Act, sec. 632 (1)—Notice Under—Unnecessary By-law—Damages—Suggested Assessment of, by Arbitration—Order of Railway Board.

Appeal by the applicant Seguin from the order of MIDDLETON, J., ante 239, refusing motion to quash by-law No. 179 of the village corporation.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

A. Lemieux, K.C., for the appellant.

H. W. Lawlor, and A. J. Reid, for the corporation.

RIDDELL, J.:—In and through the town of Hawkesbury runs a branch of the Canadian Northern Railway, practically north and south. It is carried on trestles at the northern part of the town, adjoining the River Ottawa, which it crosses.

Recently the railway company determined to fill in, making an embankment, which is, of course, much safer than trestle-work. This eminently proper scheme the town was willing to assist so far as reasonable, and that willingness, instead of being made, as it was on this motion, a matter of reproach to the town, should rather receive commendation—the railway company instead of desiring to save money were to spend money to make their railway safer for passengers, etc.

The railway crossed Union Street near the river, and the company desired to fill in the street. The town at first intended to sell the street (or part of it) to the railway company; and gave the notices required by the Municipal Act, sec. 632, for that purpose. A change was made in the plan, and the by-law that was passed was not to sell the street, but to close it. . . .

Union Street is a narrow and little frequented street near the Ottawa; the applicant Seguin owns certain land north of Union Street and west of the railway, and also an island on the river. What I have called the Main street [on a sketch made by the learned Judge] is one of the chief arteries of the town.

The by-law provided that the railway should open two streets of equal width with Union Street, the one west and the other

east of the railway, and running from Union Street to the Main street. No provision was contained in the by-law for compensation to those injured. Seguin moved to quash the by-law; my brother Middleton refused the application (November 7th, 1912), and this is an appeal from that decision, reported ante 239.

In the Municipal Act, sec. 632 (1), provides for notice of proposed by-laws for closing roads—it cannot be successfully contended that notice of an "intended by-law" to close a road is given by publishing a notice of an intended by-law to sell it. And after a great deal of backing and filling, counsel opposing the appeal admitted that the by-law was irregular.

The next argument in support of the by-law was that it was unnecessary. This argument seems to be based upon a misunderstanding of a remark of my learned brother in the course of his judgment. Mr. Justice Middleton, of course, did not state that the by-law was or might be unnecessary, making that fact a ground for refusing to quash it.

And my mind is wholly unable to understand why the fact of a by-law being unnecessary can help to support the by-law. If a by-law is necessary, there might be ground for sustaining it, but not the converse.

The contention that the by-law was unnecessary was pricked when, on counsel, (nominally for the town, in fact for the railway company), being asked if he would consent to the by-law being quashed—he at once answered in the negative.

Then we were told that Seguin was not in fact injured by the closing of the road, even if the town did close it. This is the usual contention of municipal lawyers and officers—but that is a question of fact which a court does not decide either on affidavit or on statement of counsel.

The next contention is that any harm that can accrue to the applicant, will not be due to the town closing the road, but to the railway filling it in with its embankment. I do not agree. As soon as the by-law was passed and became effective, Seguin had no right on the closed part of the street; he might, indeed, probably without interruption go along the street if and so long as this was physically possible, but it would not be as of right. If he sued the railway company the company would say that they had not interfered with any right he had—and their answer might well be considered perfect.

In Canadian Pacific Railway v. Brown (1908), 18 O.L.R. 85, I thought that when a person was in possession of land belonging to another, and with some kind of expectation that a lease formerly held would be renewed, he might claim damages from

a railway company who took the land; but the Court of Appeal did not agree, nor the Supreme Court. All the railway company will do here, they will do with the consent of the municipality, which now may exclude Seguin from the street. At all events, Seguin should have the right to test the question if so advised.

The town refused to agree that if Seguin should sue them for damages, they will not set up or rely upon sec. 468 of the Municipal Act—the by-law standing, he could not succeed in an action at law. No provision is made for compensation to him, as there should have been under sec. 629—and it would be grossly unjust to deprive him of all relief.

I do not think that the municipality can complain if we place them in the position they would have been in had they proceeded regularly—had they proceeded regularly, compensation would have been provided for. If this were done, the applicant will be in as good a position as if the by-law were quashed—his damages would be assessed by arbitration and not by a jury, that is all the difference. If then the town will undertake to proceed at once to determine the compensation which should be paid to Seguin, and to pay for it when determined, the by-law need not be set aside. In this case, as the applicant has been fought on all grounds and at every point, the town should pay the costs here and below.

If this undertaking be not given in 14 days, the by-law will be quashed with costs here and below.

We give no opinion whatever on the validity of the order of the Railway Board. If the by-law is quashed, the applicant must take his chances as to any defence based on that order.

FALCONBRIDGE, C.J.K.B.:—I agree in the result.

BRITTON, J.:—I agree in the result.

BERTHOLD & JENNINGS LUMBER CO. v. HOLTON LUMBER CO.—RIDDELL, J., IN CHAMBERS—DEC. 26.

County Court Action—Judgment in—Counterclaim—Transfer to Another County—Con. Rule 255.]—Appeal by the defendants from the judgment of the Master in Chambers, noted ante 458, where the facts are set out. The defendants appealed, a counterclaim for a very substantial sum having been filed by

them. RIDDELL, J. (after setting out the facts):—"I think the appeal must be dismissed—the circumstances are simply these. The defendants being sued in the court at Toronto for a claim to which they had on defence, instead of paying the claim and bringing in the proper court an action on a claim they had against the plaintiffs, chose to bring that action also in the Toronto court in the form of a counterclaim. They cannot complain if they are compelled to have the case tried in the court of their choice. That consideration would not, or might not be conclusive, were there not difficulties in the way of working out the rights of the parties in an action, partly tried and in judgment, in one court, and partly to be tried and judgment given in another. It is not like the case of two actions both in the same court. I cannot remove the plaintiffs' judgment into the Belleville court, or the defendants' judgment, if they get one, into the Toronto court. The best I can do is to reserve to the defendants leave, if so advised, to move in the Toronto court to withdraw their counterclaim. Upon such a motion it may be that the County Court Judge will find a way to preserve the interests of all parties—but I cannot dictate to him. The appeal will be dismissed with costs payable by the defendants as costs of the judgment already had. If the counterclaim be not proceeded with to judgment in the Toronto Court, the costs before the Master will be paid in the same way—but if it be proceeded with to judgment in the Toronto Court, to the Berthold Company in any event in the counterclaim." F. Aylesworth, for the defendants. R. W. Hart, for the plaintiffs.